Palestine Coca Cola Bottling Co., Inc. *and* Dixie Armstrong. Case 16–CA–10170

29 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 17 March 1983 Administrative Law Judge Walter J. Alprin issued the attached decision. The Charging Party filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] On 24 February 1984 the Board granted a joint motion to sever cases and motion to approve withdrawal and severed the instant case from Cases 16–CA–9424, 16–CA–9651, 16–CA–10156, 16–CA–10257, and 16–CA–10394.

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. The complaint in this case originally issued November 24, 1980,[1] and thereafter was amended several times. The issues herein are generally whether Respondent engaged in a number of specified practices which interfered with, restrained, or coerced employees in violation of Section 8(a)(1) of the National Labor Relations Act, discriminated to discourage union membership in violation of Section 8(a)(3) of said Act, and refused to bargain collectively in violation of Section 8(a)(5) of said Act. The case was tried before me at Palestine, Texas, from June 7 through 11, 1982, inclusive.

Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, attorney for Charging Party Armstrong, and attorney for Respondent, I make the following

[1] All dates are in 1980 unless otherwise stated.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT AND THE LABOR ORGANIZATION INVOLVED

Respondent is a Texas corporation engaged in the bottling and distribution of carbonated beverages at Palestine, Texas. During the 12-month period proceeding the complaint, in the course and conduct of its business operations Respondent purchased and received at Palestine products, goods, and materials valued in excess of $50,000 directly from points outside the State of Texas. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act. It also admits, and I find, that the United Food and Commercial Workers Union, Local 210, affiliated with the United Food and Commercial Workers International Union, hereinafter the Union, is a labor organization within the meaning of Section 2(5) of the Act, and that all full-time and regular part-time employees employed at the Respondent's Palestine facility, excluding all casual employees, guards, watchmen, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

II. INTERFERING WITH, RESTRAINING, OR COERCING EMPLOYEES

A. *Interrogation of Employees*

At all times mentioned herein Clint Surles was Respondent's president, Leon Main was general manager, Chris Smith was sales manager, and Joy Brazziel was office manager. A number of employees testified that they were interrogated by them, after the start of the Union's organizational campaign, as follows.

Jimmy McEuen, a route salesman, testified that in August Main asked him, "what kind of Union were we starting"; that, in September, the day after the first union meeting, Main asked what he thought of the first union meeting; that in mid-October, Main asked if he thought the vote would go for the Union; that in November 1981 the day after visiting another employee with the union representative, Main asked, "How did you enjoy your visit . . . last night?" Edward Hughes, a filler in the bottling department, testified that while working at his work station one morning shortly before the union election Main approached him and asked how he felt in regard to the Union. Billy Moten testified that Main asked him in October 1981 whether he was going to strike with the Union, and on another occasion he was asked the same question by Surles. Rhonda Streetman, an office employee, testified that Brazziel asked her whether she or the other two office employees had gone to a union meeting and how they felt about the Union. Wilson Henry, a route salesman, testified that Main asked him in September, prior to the first union meeting, how he felt in regard to the Union. Jerry Hall, a warehouseman, testified that Main asked him during his preemployment interview in July or August, whether or not he favored the Union. Morris Cook, a route serviceman, testified

that Main asked him in September whether he had "signed a Union paper" and whether he was going to vote for the Union. Frank Fletcher, a warehouseman, testified Main asked him in August whether he was going to the first union meeting and, on another occasion, whether he was for or against the Union. Willie Walker, a forklift operator, testified that Main asked him in September whether he had signed a "Union paper" and whether he was going to vote for the Union. Frank Fletcher, a warehouseman, testified Main asked him in August whether he was going to the first union meeting and, on another occasion, whether he was for or against the Union. Willie Walker testified that Main asked him whether anyone had mentioned to him a plan to organize a union, on another occasion whether there was to be a union meeting that night, and on still another occasion whether he would walk a picket line in the event of a strike. Virginia Sue Williams, a production line worker, testified that Main asked her, in various conversations, "what kind of a Union are you all organizing," who started the Union, and who would pay her insurance if there were a strike.

Main, Brazziel, and Surles testified as to some of these alleged conversations, denying them or attempting to put them in such context as not to constitute threats.[2] I have not credited their denials because I find it much more plausible that the conversations described by the employees took places as stated.[3] That the conversations may in some instances have been innocent inquiries or comments by management representatives does not lessen the effect of the threats implicit in management's concern with identifying those employees who might be active in or in favor of the Union's organizational attempt. I therefore find that Respondent violated the Act by interrogating employees.

B. *Surveillance*

The General Counsel alleges that Respondent conducted a surveillance of the location of the union meetings held regularly on Tuesday evenings at the county courthouse on the square in the center of town. Moten testified that on October 20, 1981, he observed Main and Smith, in Main's truck, riding around the courthouse square, turning their heads as if in an attempt to observe who was attending the meeting. Jerry Benge, a route salesman, and Earline Fletcher, wife of a warehouseman, who were waiting to enter the courthouse for the meeting, confirmed this testimony, but they all drastically disagreed in describing the route which the truck took. Both Main and Smith denied having engaged in such a surveillance, or even driving by the courthouse on the night in question. I credit the denials of Main and Smith, particularly because there would have been no reason for such a surveillance since by October 1981 it was fully known which employees were active in the Union, the active participants and others had bumper stickers affixed to their cars showing a lack of fear of being identified, and the employees were unable to agree on salient facts. I therefore find that no such surveillance in fact took place.

C. *Other Threats*

In addition to the instances of interrogation and surveillance mentioned above, the General Counsel alleges that by various statements Respondent threatened employees in other ways.

The General Counsel alleges threats of loss of employment. McEuen testified that in September, the day after the first union meeting, Main told him he could be fired if he went out on strike, and that if Main were Respondent's president he would enter into surface bargaining until all employees went out on strike upon which he would hire all new employees. Moten testified that in October 1981 Main asked whether he was going on strike and told him that if he was "we don't need you—I told you that before," referring to his preemployment interview in which Moten was told that if he was for the Union he was not needed. Moten also testified Surles told him during a conversation that if they went out on strike he would not want any of the employees back, and that Smith told him that Smith's great-great-grandmother, a stockholder in Respondent, would "padlock" the plant before a union got in. Jerry Hall testified Main told him that in the event of a strike Respondent could hire a whole new crew. Willie Walker testified Main rhetorically asked him if he thought Respondent would fire new employees to hire back strikers. Morris Cook was asked to sign a letter stating he had not ever been, was not then, and never while employed by Respondent would become a member of any union.

Main denies suggesting to McEuen the idea of forcing a strike and replacing strikers, and denies threatening that employees would be fired when he merely stated that the plant would continue to operate during a strike with new employees. Surles denies the alleged conversation with Moten and that he ever told any employee that he would not want them back if they went out on strike. Smith denies stating that his relative would close the plant rather than admitting the Union, testifying that he said it would be better for both the owners and the strikers if the business were continued rather than locking the gate and "calling it quits." Surles explains the "nonunion" letter of Cook as having been necessary to obtain the account of a prospective customer which would not permit union members on its premises.

The General Counsel also alleged threats of Respondent's determination to exclude the Union, and to impose more onerous working conditions and reduce benefits. Respondent denied making such threats. McEuen testi-

[2] Main testified that he may have asked McEuen what "kind" of union was being started, in a general conversation as to the proclivity of some unions to engage in violence. He specifically denied ever asking who started or who was sympathetic to the Union. He specifically denied asking Sue Williams about who was to pay insurance premiums in the event of a strike though admitting a general conversation with her on the superiority of Respondent's health insurance plan. Joy Brazziel testified, but not as to questioning Streetman. Surles testified and denied that he ever had a conversation with Moten about the Union or a strike, or had threatened anyone.

[3] Main's testimony that he had no need to ask who started or was sympathetic to the Union since within a month of the start of the campaign he had that information, if accepted, would no more than indicate his general interest in identifying the individuals and the efficacy of early questioning both pro- and antiunion employees.

fied that in mid-October Surles called a meeting and flatly stated that there would be no Union,[4] that at the time of the union election Main warned him that when voting he should bear in mind that Respondent did not have to assign him helpers on his route and that from that point on the previous practice of assigning help to him was drastically reduced.[5] Hughes testified that after the union election Main told him he would be reduced to a 30-hour workweek and that "if you want to quit, just go ahead out the door." Mixon testified that, at his preemployment interview in October 1981, Main told him that a union had been started and "there would more than likely be a strike sooner or later" and that Surles told him that the employees would get only what he wanted them to have regardless of the Union. Moten testified Surles told him he would not sign a contract with the Union, that he was going to continue to run the business, and that no union was going to come in. Walker testified Smith told him that in "no way" was there going to be a union. Williams testified Main told her "you are all crazy if you think that Mr. Surles is going to negotiate with you all if it comes down to it." A number of employees testified that they were asked rhetorically who would pay for their insurance if they went on strike and how they would make their car and house payments.

Though the testimony as to all of these alleged threats is contradictory I again credit that of the employees, doing so on three grounds. First, there is the corroboration of McEuen's testimony that his help was cut. Second, there is the finding, later herein, that Respondent was not in fact bargaining in good faith with the Union after its election. Third, there are the findings throughout this decision that Respondent evidenced union animus. I therefore find that these threats constituted a violation of the Act.

There was also testimony that Respondent had turned off heaters during the winter, and removed a warehouse wall in order to permit circulation of cold air to make working conditions more arduous and to encourage unionized workers to quit.[6] Surles testified credibly that the heaters had been installed solely for protection of the product and had not been designed and were not effective to warm the workers. This testimony seems entirely in keeping with Respondent's attitude regarding its obligations to its workers. The wall was removed from the warehouse in order to increase storage space while retaining the OSHA required aisle space. The wall had also contained a 40-foot opening, and was not effective in blocking circulation. In view of these matters, I find that turning off the heaters and removing the wall did not constitute violations of the Act.

The General Counsel also alleged that Respondent solicited employees' grievances in violation of the Act. Moten testified that Surles asked him what the Union could do for him that Surles could not, and Benge testified that Surles assured him that $30,000 had been set aside to institute a pension plan. I credit both statements. When viewed as an integral part of a pattern of illegal opposition to the purposes of the Act, as evidenced by Respondent's entire course of conduct, I find that such solicitation constitutes a violation.

The General Counsel also alleged threats of physical harm for participating in the strike. McEuen testified that shortly after the strike began, while visiting a customer with fellow striker Yount, he was approached by Joel Carico, who told him he had been offered $25 to "whup" him and would run him over with his truck. The conversation was confirmed by Yount, and Carico did not testify. Carico's responsibility at Respondent was limited to seeing that the production line operated properly, with no independent authority to act in a supervisory capacity. Carico's responsibilities were of a routine or clerical nature not requiring the use of independent judgment, and I do not find him to be a supervisor within the meaning of Section 2(11) of the Act. I find that the threat was not made by Respondent, and not to have constituted a violation of the Act.

III. DISCRIMINATION TO DISCOURAGE UNION MEMBERSHIP

The General Counsel alleges that Respondent discriminated against employees to discourage union membership by withholding sick pay and wages, and discriminatory discharges. Discrimination is also alleged by withholding merit and longevity raises and by granting other raises in the absence of an impasse, which are discussed in the next section of this decision.

A. *Withholding Sick Pay*

Frank Fletcher, a warehouseman and member of the Union's negotiating team, became sick on Monday, November 2, 1981, and worked only half a day, spending the next several weeks at home ill. The strike began on Monday, November 9, 1981, and Surles phoned Fletcher at home, explaining that he was cutting off insurance

[4] Surles denied this, testifying that at the meeting he only read the following statement.

> A union cannot give you anything. A union does not have a bottling company. It does not have trucks; it does not have jobs. A union doesn't have routes, doesn't have sales, doesn't have customers, and it doesn't pay wages. The Palestine Coca Cola Bottling Company has all those things.
>
> A union speaks for all employees on all issues at all times, even though you may not have voted for one. A union promises everything but it only gets for the employees what is negotiated for them.
>
> A company cannot deal with employees, but it must deal with the union. A union is like a wall between the company and the employees. Once the union becomes the representative of the employees, all benefits of the employees are subject to negotiations, all benefits such as vacation pay, sick pay, birthday pay, holiday pay, wages, and working conditions.
>
> If a union is voted on, the company cannot give any raises or additional benefits to employees that have earned a raise in pay or all those benefits by merit.

[5] Main denied failing to provide assistance as required, and Smith testified that he had assigned helpers to McEuen on numerous occasions, as shown in estimates he later prepared. This was contradicted by the testimony of Stephens, a warehouseman assigned to help routemen, who stated that though frequently assigned to McEuen before the election, and even though McEuen's route was later enlarged, he noted a distinct reduction in assignment of himself or of others to assist McEuen and workers who would have otherwise been given that work were assigned to personal chores such as washing cars and cutting grass for Respondent's stockholders.

[6] The complaint was amended at the hearing to include these allegations as unfair labor practices.

benefits of strikers and needed to know whether or not Fletcher was with the strikers. Fletcher responded that he was with the strikers, which ended the conversation. At that time it was Respondent's policy to give 5 days of sick pay, but Fletcher was not paid for any of the time he was off sick between November 2 and 9 until after he had filed an unfair labor practice charge, on which Respondent gave him sick pay for one day. Brazziel testified that the failure to make payment had been no more than an oversight, but Surles was obviously aware both of Fletcher's illness and of his identification with the Union. At the hearing herein Fletcher responded to cross-examination that he was no longer owed any sick pay, but it was not explained why 1 day of sick pay covered 4-1/2 days of absence. The pertinent fact, however, is that Respondent initially denied Fletcher sick pay, based on his union association, and in the circumstances here as a whole, I find that such denial was based on Fletcher's concerted and protected activities and constitutes a violation of the Act.

B. *Withholding Wages*

McEuen, Yount, Mixon, Benge, Henry, and Cook testified that their final paychecks from Respondent, issued after the beginning of the strike, were in sums less than the amounts due them. Cook testified that the difference represented 5 hours of overtime for which he was not paid, and the others testified that they had been told the sums reflected amounts of product shortages in the last pay period or for periods of up to 2 months prior thereto, and in some instances also included the deposit of $9 on a special leather wallet where not returned. The routemen all testified that the shortages alleged did not take place or could not have been of the volume charged. Brazziel testified on behalf of Respondent that she had computed the final checks from daily records indicating hours and shortages, and produced the records which were available for inspection. The General Counsel was unable to prove that the records were incorrect or the deductions improper, and I find that these deductions did not constitute a violation of the Act.

C. *Discharge of Dixie Armstrong*

The Union's organization drive began in August. Respondent first employed Armstrong on September 27, and she was told at the employment interview that Respondent wanted someone to "stand with them." Her first job was as office worker for the "Dogwood Vending" division which provided daily maintenance of snack and sandwich vending machines serviced by routemen. She handled cash, computed tally sheets, ordered merchandise, maintained current inventory, posted to a general ledger, and maintained timecards, as well as assisting, as did all three office workers, with answering phones and dealing with walk-in customers.

The union election was held November 21, and all three clerical employees as well as production employees and routemen voted. Armstrong had not been sympathetic to the Union, had not attended meetings or otherwise identified with them, but was so upset by what she considered the unfairness of an antiunion film shown at a company dinner shortly before the election that she voted in favor of the Union.

The morning after the election Brazziel was extremely upset and claimed that "someone had lied" to her about their union attitude since only five employees had voted against the Union. The other two clerical employees spoke up, expounding their loyalty to Respondent, but Armstrong remained silent. After the Union won the election all three of the clerical workers felt a change in Respondent's attitude, and two of them voluntarily left Respondent's employ.

When Rhonda Streetman, the clerical worker who did the accounting for the beverage routes, decided to leave, Armstrong asked her about taking over the route accounting, which was a more difficult and a higher paying position. Streetman passed the request to Brazziel, who interviewed Armstrong and, stating, "We like your work and I believe you can do the job," gave her the promotion.

The job of route accounting primarily required taking cash and reports from route salesmen, and posting cash and charges as well as volume and type of product (with size and price variations) to customers' accounts and to the general ledger, as well as other functions. Brazziel had always trained the employees given this job. She had trained Streetman by having her sit at Brazziel's desk for at least a week to watch how the work was done, after which Streetman performed the work herself, subject to Brazziel's approval, for at least another week. Streetman thereafter still had problems daily requiring her to get help from Brazziel. It was several months before Streetman felt she was doing a credible job and even then there were occasions when she could not balance the day's operations and had to await Brazziel's return to complete the job.

Streetman had arranged for a 3-week medical leave, to return for 2 additional weeks to "help out" before permanently leaving. In the week prior to the medical leave, Armstrong sat with Streetman "for a few hours or a few minutes each day" during which Streetman wrote down instructions. There is a conflict of testimony as to training during Streetman's medical leave—Brazziel testified that she gave Armstrong the same type of training as had been given others, by doing the work herself for a week while Armstrong sat with her and observed, while Armstrong testified that she did the work and took it to Brazziel for checking. Streetman testified that during two phone conversations Brazziel reported that Armstrong was doing well on the job, but Brazziel testified that she in fact had complained to Armstrong about her failure to double-check her figures, to alphabetize certain papers, and other items. Armstrong testified that though she was unsure of herself and asked Brazziel for additional training she was told by Brazziel that she was "doing fine." When Streetman returned from her medical leave she expected to continue training Armstrong, but instead was assigned to different work until she left permanently. Brazziel made no written notes of her dissatisfaction until August 13 and 15, 1981, and on August 15, 1981, sent Armstrong a memo stating:

> The flavors on this Daily sales (8/13/81) were all mixed up. I have changed and posted to sales journal. Let me tell you that this is your responsible [sic] and is just as important as getting the money to the bank or any other duty in this office. You need to be very careful about doing your job. I do not have the time to stand over your shoulder to make sure you are doing everything right. Now its been 6 weeks since you were placed at this desk and I think its time you buckle down and pay more attention to your job. There are still more duties to this desk you are not doing. Such as give Chris daily sales figures, and writing daily sales in pencil in sales journal. I need someone that will get in there and hustle and someone I can rely on to do her job correctly. Therefore its up to you. I'm going to give you 2 more weeks to show improvements.
>
> If you have any questions come see me.
>
> Please sign and date this and return to me.

Armstrong testified that she did confer with Brazziel after receiving this, and also stated that until this time she had been spending about one-third of her time working on Dogwood Vending business. This latter is contradicted by the testimony of Brazziel, of Knipe, the employee hired to replace Armstrong on Dogwood Vending, and by the indisputable evidence of the inventory ordering book which showed that Armstrong had in fact not ordered any inventory for Dogwood Vending after July 1, 1981, when she first moved to her new job. At the end of the 2-week period, on August 28, 1981, Brazziel informed Armstrong that her work had not improved sufficiently and that she was discharged. Armstrong asked to be returned to the Dogwood Vending work, but Brazziel said that it would not be possible.

The General Counsel contends that Respondent conceived and executed a plan to rid itself of all the office employees because of suspected union sympathy, that two of the three were persuaded to "voluntarily" leave within 6 to 9 months by a change in Respondent's attitude, and that Armstrong was promoted to a new position where either she was intentionally not given the customary and necessary training or where she was unjustly accused of being unable to perform adequately. In view of Respondent's other activities showing union animus I accept the possibility that it would plan to rid itself of employees it considered suspect. In view of the evidence of the order book I am unable to credit Armstrong's testimony about her continuing to spend a third of her time on her old job, and therefore I also do not credit her disputed testimony that she received no training and that she was in fact performing the work satisfactorily. This being the case, I do not find that Armstrong was discriminatorily discharged, or that her discharge was the result of protected and concerted activity.

IV. REFUSAL TO BARGAIN COLLECTIVELY

The General Counsel alleges that Respondent failed to engage in collective bargaining in good faith by withholding merit and longevity increases, by unilaterally granting raises without reaching an impasse, and by engaging in surface bargaining. The General Counsel argues that by reason of the previously found violations of Section 8(a)(1) and (3), and the failure to bargain collectively, Respondent's employees engaged not in an economic strike, but in an unfair labor practices strike entitling them to reinstatement after their unconditional offer to return.

A. *Discontinued Wage Increases*

When Surles came to Respondent in 1978 he changed the prior practice of giving automatic longevity wage increases on the employee's anniversary date to a practice of giving "merit" increases on such date. A number of the General Counsel's witnesses testified that they regularly received such increases after 1978, whether "longevity" or "merit," prior to the Union's campaign, and not after. There was no evidence presented as to the criteria or methodology of giving "merit" raises. Only Williams testified as to any allegation of less than adequate service.[7] However, McEuen testified that in July 1981 Main told him that because of the Union's certification Respondent would give no raises, except to nonunion employees,[8] until the issue of wages was negotiated to completion. Yount testified that when hired in August 1981 his pay was slightly higher than other routemen because Main told him that his salary could not be increased during negotiations with the Union, which might be expected to last some time. Main testified that when Moten made a comment about "being taken care of" if he worked during the strike, Main responded that he could not promise any money "because that is out, as long as this is going on."

In view of Respondent's union animus as indicated by its other activities, and on the evidence here cited, I find that Respondent unilaterally discontinued its prior practice of giving merit increases on anniversary dates. See *Ithaca Journal-News*, 259 NLRB 394, 395–396 (1981).

B. *Granting Unilateral Wage Increases*

At the poststrike negotiating meeting of March 24, 1982, counsel for Respondent stated that he wished to discuss only one matter—an increase from $4.50 per hour to $5 per hour for two nonstriking recent clerical employees following the completion of their probationary period. The union negotiators pointed out that there was an entire proposal on the table, and that they would not limit negotiation to a single issue.[9] The General Coun-

[7] Respondent's reason for denying Williams a raise was stated to have been her refusal to perform janitorial work in cleaning the men's rest room when directed to do so. Williams, a production line worker, considered the direction to have been degrading and calculated to force her resignation. However, it was established that the direction was given on the single occasion when the employee normally performing that work was absent, that Williams had once voluntarily performed the work, and that when Williams refused one of her female coworkers, who had also once previously voluntarily performed the work, did the job. I find that the assignment of this job to Williams was for a proper business purpose, and that her refusal to perform was a valid ground for denying a merit increase.

[8] Main denied making such a statement, but I credit the testimony of McEuen on this point as it was born out by later happenings.

[9] A similar unilateral wage increase was later given to one Garrett.

sel's position is that Respondent's unilateral granting of these wage increases in the absence of an impasse constitutes a breach of the duty to bargain. Respondent's position is that an impasse had been reached by the Union's refusal to bargain to agreement on this single issue. The General Counsel's own witnesses, however, have testified to Respondent's prior practice of granting increases to employees at the end of their probationary periods. I therefore find that the unilateral wage increases to employees Rossier, Knipe, and Garrett on completion of their probationary periods were not violations of Respondent's duty to bargain.

C. *Surface Bargaining*

The bargaining intention of Respondent was openly to retain absolute control over all material aspects of employee working conditions, hours, and wages, notwithstanding the Union's certification. Surles commented on numerous occasions to various employees that they would receive no more than he decided to give them.[10]

Negotiations on behalf of Respondent were carried on by its vice president and its counsel and at Surles' direction were tape recorded, with the tapes then played for Surles after each bargaining session. Counsel and Surles both testified that counsel had full authority to negotiate, subject only to approval of the final settlement by Respondent's board of directors, just as union agreement would be subject to approval of the membership. Respondent counsel's frequently stated attitude was that none of his proposals was final and that any topic was negotiable though the price extracted for agreement might be considered high.

Bargaining began August 22, 1981. The Union had prepared an initial proposal, provided to Respondent in advance. Respondent not having reviewed it, the first session was spent in going over each union demand. At the second session, September 5, the third, September 11, and the fourth, September 18, 1981, proposals were made by Respondent and there was some agreement. Clauses referring to dues-checkoff, management rights, bargaining unit work, new hire and termination lists, grievance procedure, leaves of absence, and wages remained at issue. At the end of the fourth session it was agreed that a meeting limited to Respondent's counsel, Crawford, and the union representative representative, Christ, might be profitable. That meeting took place on October 2, 1981. Crawford and Christ agreed that it would be best to determine quickly whether an agreement was possible, and each representative was to confer with his principal and return with a proposal "close to a final offer," after which another bargaining session could be scheduled to resolve outstanding differences.

On October 14, 1981, the Union presented its offer, a major change being agreement to Respondent's management-rights clause but for the rights to contract out, or unilaterally to sell, close, or relocate, and adding a grievance procedure. Christ had scheduled a meeting with the union members for the night of November 3, but did not receive Respondent's offer until that afternoon, when it was given him by Crawford with the comment, "Here it is, but you're not going to like it."

Respondent's proposed "close to a final offer" remained close to its previous offers except where reduced and made more restrictive. The management-rights clause remained as previously except for the addition of a new provision requiring employee polygraph examinations on demand. Holiday and vacation pay were reduced by a day. Drivers' vacation pay was reduced by half. Health insurance was completely withdrawn. Wages were covered by a "Wage Schedule" naming current employees and leaving no agreement for future hires. The Employer reserved complete rights to hire, fire, and discipline without recourse, as well as to contract out work, sell, or relocate.

The union membership met and adopted the following resolution:

> The Company offer is hereby rejected as an obvious attempt at surface bargaining. Our representative is hereby directed to file appropriate unfair labor practice charges against the company. Our bargaining committee is also authorized to call a strike at any time should the company continue to refuse to bargain in good faith.

On November 5 the parties met again. Christ directed Respondent's attention to existing benefits having been removed from negotiation, including loss of vacation pay, loss of paid holiday, and loss of health insurance, and to the wage scale being limited to current employees, asking whether this had been an oversight. He was assured that reduction of current benefits and the wage provisions were intentional, and that the proposal stood as made.

While Section 8(a)(5) of the Act specifically provides that any party to collective bargaining cannot be compelled to agree to a proposal or to make a concession, it has often been reiterated that the Act establishes a duty "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement."[11] Even where there is apparent compliance with the physical requirements of bargaining, an examination of all the circumstances of the matter may show that there was in fact an attempt to frustrate agreement. The Board has been afforded flexibility to determine whether a party's conduct at the bargaining table evidences a real desire to come into agreement.[12] Where an employer insists on a set of terms which would place the employees and the Union in a worse, or no better, economic position than had there been no contract at all, thereby demonstrating a desire to penalize the employees, undermine the Union, or reject collective bargaining, a finding that it has acted in bad faith is inescapable. In the matter at hand the em-

[10] Surles' explanation of his meaning, that since he would execute any negotiated settlement it must contain what he agreed to give, is disingenuous and does not disguise his intention to retain the status quo at all costs.

[11] *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960), and other citations at *United Contractors Inc.*, 244 NLRB 72 (1979).

[12] *NLRB v. Hospitality Motor Inn*, 667 F.2d 562, 563 (6th Cir. 1982), enfg. 249 NLRB 1036 (1980), and citing *NLRB v. Insurance Agents*, 361 U.S. 477, 478 (1960).

ployer approached the bargaining table unreconciled to its employees' selection of a bargaining representative, loathe to accept the collective-bargaining principle, determined not to surrender in material respects the full freedoms it previously enjoyed to unilaterally regulate its labor relations, and with no serious desire to reach agreement on any basis other than one subverting the Union's bargaining status. It is no answer that Respondent would have entered into a contract had the Union only accepted the offer—the terms proposed were such that the Union could not accept them without violating its trust to the employees it represented.[13] While a reduction in benefits alone might not establish bad faith, where it is coupled with rigidly holding the line in other areas and with other unfair labor practices prior to and during negotiations it is an indication of bad-faith bargaining.[14] Here Respondent had refused to agree to a dues-checkoff while providing no reasonable economic or philosophical basis,[15] had insisted on a management-rights clause which left employees with no avenue of redress from unilateral control by the employer not only to wages and working conditions but from the possibility of destroying jobs by subcontracting, sale, or relocation,[16] had by all its actions demonstrated to the employees that it stood by its preelection statements that the Union would not be of any help to the employees since management would continue to operate as it had in the past, and had reduced vacation time and pay.[17] Respondent's failure to define, explain, or advocate its position and instead its attempt to force on the Union a reduction of prior working conditions are indicia of its lack of good faith.[18] It is inimical to the principles of good-faith bargaining for an employer to offer, without adequate explanation, proposals less favorable than those previously offered and rejected[19] and it is equally inimical to offer proposals less favorable than conditions existing prior to selection of the Union as bargaining representative, for this directly seeks to dilute the Union's effectiveness and its ability to represent its members.[20] While Respondent's proposals were not per se violations, the totality of its conduct, both at and away from the bargaining table, clearly demonstrate what I hereby find to constitute an intent to frustrate meaningful bargaining, in violation of Section 8(a)(5) of the Act.[21]

D. *Failure to Reinstate*

The Union's resolution, previously quoted in full, was read at the bargaining session of November 5, 1981. The Employer's response was to make no further proposals to change the situation which I have found to constitute surface bargaining, an unfair labor practice. Four days later, on November 9, 1981, in what can only be found to be a result of Respondent's continued bad-faith bargaining, the Union began a strike which continued until the unconditional offer of the strikers to return to work on January 8, 1982.

I find that the strike was an unfair labor practice strike. The strikers were therefore entitled to reinstatement on their application. Respondent's failure to reinstate such strikers, discharging if necessary any strike replacement, is clearly a violation of Section 8(a)(1) and (3) of the Act, and I so find.[22]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees employed at Respondent's Palestine facility, excluding all casual employees, guards, watchmen and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By interrogating employees, by threatening employees with loss of employment, by threatening employees with more onerous working conditions and loss of existing benefits, by threatening employees that certification of union representation will be ineffective, and by soliciting employee grievances, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By withholding the payment of sick pay due to Frank Fletcher in order to discourage membership in a labor organization, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

6. By failing and refusing to bargain collectively with the Union as the representative of its employees, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

7. By failing and refusing to reinstate unfair labor practice strikers on or about January 8, 1982, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(1), (3), and (5), of the Act, I recommend that it be required to cease and desist therefrom, and in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

Having been found that Respondent discriminatorily refused to reinstate the unfair labor practice strikers on

[13] *"M" System*, 129 NLRB 527, 549 (1960).
[14] *Electri-Flex Co.*, 238 NLRB 713, 731 (1978).
[15] *Rockingham Machine-Lunex Co. v. NLRB*, 665 F.2d 303 (8th Cir.1981); *Marriott Corp.*, 258 NLRB 755 (1981).
[16] *Hickenbotham Bros., Ltd.*, 254 NLRB 96 (1981); *Hospitality Motor Inn*, supra.
[17] *Edward J. Alexander*, 235 NLRB 1500 (1978).
[18] *Hudson Chemical Co.*, 258 NLRB 152 (1981).
[19] *Carpenters Local 1780*, 244 NLRB 277 (1979).
[20] *Seattle-First National Bank*, 241 NLRB 753 (1979).
[21] *Parkview Nursing Center II Corp.*, 260 NLRB 243 (1981).
[22] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 953 (1938); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 286-287 (1956); *International Telephone & Telegraph Corp.*, 166 NLRB 592 (1967), enfd. 435 F.2d 1308 (1971); *Carpenters Local 1780*, supra.

their unconditional January 8, 1982 application to return to work, I recommend that Respondent be required to offer them immediate and full reinstatment to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements, and shall make them whole for any loss of pay they may have suffered as a result of the discrimination against them from January 8, 1982. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis plumbing Co.*, 131 NLRB 716 (1962). Respondent shall be required to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Palestine Coca Cola Bottling Co., Inc., of Palestine, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees as to union activities.

(b) Threatening employees with loss of employment, with imposition of more onerous working conditions or with loss of current benefits.

(c) Creating an impression among employees that the selection of union representation will be ineffective.

(d) Soliciting employee grievances.

(e) Withholding sick pay payments to discourage union activity.

(f) In any manner engaging in surface bargaining or other bargaining not in good faith, without real intention of reaching an agreement with the Union as the exclusive representative of the employees in the unit referred to above.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union as the representative of the employees in the unit referred to above.

(b) Offer to the striking employees who made unconditional application to return to work on January 8, 1982, immediate and full reinstatment to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay or other benefits suffered by reason of the discrimination against them in the manner described above in the section entitled "The Remedy."

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at Respondent's facility at Palestine, Texas, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof and maintained by Respondent for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT question employees about their union activities or those of other employees.

WE WILL NOT threaten employees with loss of employment or plant closure for engaging in union activities.

WE WILL NOT threaten employees with imposition of more onerous working conditions for engaging in union activities.

WE WILL NOT threaten employees with loss of current benefits for engaging in union activities.

WE WILL NOT solicit employee grievances to discourage union activities.

WE WILL NOT withhold sick pay payments to discourage union activities.

WE WILL NOT engage in "surface bargaining" or other bargaining not in good faith, without any real intention of reaching an agreement with the Union as the representative of the employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, on request, bargain collectively in good faith with the Union as the representative of the employees in the unit referred to above. The collective-bargaining period will begin from the date when we commenced to bargain in good faith, and the Union's certifi-

cation will be extended for a period of 1 year from the date when we begin to bargain in good faith with the Union.

WE WILL, to the extent we have not already done so, offer full reinstatement to their old jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, to all striking employees who made unconditional application to return to work on January 8, 1982, dismissing if necessary any persons hired on or after November 9, 1981.

WE WILL make whole, with interest, all striking employees who made unconditional application to return to work on January 8, 1982, for loss of pay resulting from our failure to offer them immediate reinstatement following the end of the strike on January 8, 1982.

PALESTINE COCA COLA BOTTLING CO., INC.